No. 97-372

JAN 15 1998

In The Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE GENERAL CHEMICAL CORP., ET AL. IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the direct, *ad valorem* taxation of exports by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) violates the Export Clause of the Constitution under the holding of this Court in *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996).

PARTIES TO THE PROCEEDINGS

Counsel for *amici curiae* named in paragraph 1 below, appear with the written consent of the parties and certify the following:

1. The full name of every *amicus* represented by this brief is: General Chemical Corp., Sumitomo Corp. of America, Newell International, Siemens Energy & Automation, Inc., Siemens Power Corp., Siemens Medical Systems, Inc., Siemens Transportation Systems, Inc., Siemens Solar Industries, Unisys Corp., Becton Dickinson and Co., Dart Container Corp. of Michigan, Capital-Mercury Shirt Corp., Joytex Co. &/or Lissabelle Co., Konica Imaging U.S.A., Inc., Konica Manufacturing, U.S.A., Inc., Kraft Foods Inc., Minolta Corp., Oscar Mayer Foods Corp., State Insulation Corp., Tarrab Export Co., Inc., The Standard Tallow Corp., Union Underwear Co., Inc., and Warner-Lambert Corp.

2. The names listed in paragraph 1 are the real parties in interest.

3. The parent company of the Siemens companies listed in paragraph 1 which has publicly traded shares issued to the public is Siemens A.G. of Germany, the parent company of the Konica companies listed in paragraph 1 above which has publicly traded shares issued to the public is Konica Corporation of Japan; the parent company of Sumitomo Corp. of America which has publicly traded shares issued to the public is Sumitomo Corporation of Japan; the parent company of Kraft Foods Inc., which has publicly traded shares issued to the public is Philip Morris Companies, Inc.; the parent company of Minolta Corp. which has publicly traded shares issued to the public is Minolta Co., Ltd. of Japan; the

parent company of Newell International which has publicly traded shares issued to the public is The Newell Co.; the parent company of Oscar Mayer Foods Corp. which has publicly traded shares issued to the public is Philip Morris Companies, Inc.

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In the Supreme Court of the United States

October Term, 1997

No. 97-372

United States of America, Petitioner

v.

United States Shoe Corporation, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* GENERAL CHEMICAL CORP., ET AL. IN SUPPORT OF RESPONDENT[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are exporters of a wide range of products from the United States to countries abroad. Their exports contribute to the United States balance of trade. The imposition of the Harbor Maintenance Tax on their exports places them at a competitive disadvantage in world markets. They believe that the imposition of this tax

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[1] This brief was authored in whole by the undersigned counsel of record and no party other than the named *amici curiae* has made a monetary contribution to its preparation or submission.

on their exports is unconstitutional under Article I, Section 9, Clause 5 of the United States Constitution.

STATEMENT OF THE CASE

The Harbor Maintenance Tax (26 U.S.C. 4461) imposes a direct, *ad valorem* tax on exports from the United States. The tax is not imposed on vessels using the ports, and no tax is imposed in the case of vessels using the port which do not contain cargo.

Amici curiae otherwise adopt the Statement of the Case by respondent, United States Shoe Corporation.

SUMMARY OF ARGUMENT

The Harbor Maintenance Tax (hereinafter: HMT), 26 U.S.C. 4461(a), is a direct, *ad valorem* tax on exports which violates Article I, Section 9, Clause 5 of the United States Constitution. The decision of this Court in *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996), is dispositive and *stare decisis* of the issues presented in this case. Petitioner has ignored the decision of this Court in the *International Business Machines Corp.* case (hereinafter *IBM*) and has failed to meaningfully address the issues presented in this appeal. The decision of the United States Court of Appeals for the Federal Circuit which follows the decision in the *IBM* case and holds that the HMT violates the Export Clause of the Constitution should be affirmed.

ARGUMENT

Introduction

This Court has held that "the Export Clause of the Constitution [prohibits] the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 517 U.S. at 845. The court of appeals initially stayed the filing of briefs in this case with the unanimous agreement of the parties and the *amici* pending this Court's decision in the *IBM* case. In its petition for writ of certiorari in the *IBM* case, petitioner, United States, noted the significance of that case with respect to the "proper scope of the Export Clause" arguing that the case had "significance not only for the tax imposed [in the *IBM* case] but also for other nondiscriminatory federal taxes of general application." The example of such other taxes cited by petitioner was, of course, the HMT. Petition for Writ of Certiorari at 13-14, *United States v. International Business Machines Corp.*, Docket No. 95-591. Petitioner clearly recognized that the decision in the *IBM* case would have a major impact on the proper interpretation of the Export Clause and on the outcome of the HMT case. The court of appeals, respondent and the *amici* likewise recognized that the decision in the *IBM* case could be dispositive of the constitutional issues in this case. We respectfully submit that it was.

Even if there could be any possible doubt as to the unconstitutionality of the direct taxation of exports by the HMT in the wake of the *IBM* decision, it is absolutely astounding that petitioner could file a 31 page brief and not even cite or mention, much less analyze, the impact of the *IBM* case. Certainly, the *IBM* case now stands as the leading and the only case

in the modern history of the Court to squarely consider the scope of the Export Clause of the Constitution. One would assume that a party petitioning from a decision of a court of appeals, which relied upon a decision of this Court as controlling on the issue, would address that decision. Indeed, even a first year law student would recognize that a brief which did not cite, analyze and attempt to distinguish such an adverse precedent would receive a failing grade.

We respectfully submit, however, that this is not merely an issue of poor brief writing. Failure to address the *IBM* case is part of a continuing strategy by petitioner after this Court's decision in *IBM* to distract both the court of appeals and this Court from the fundamental issues of the case by focusing on the Commerce Clause and the Import-Export Clause and not on the Export Clause. The strategy is to avoid having an adversarial dialogue with respondent and *amici* on the *IBM* case by failing to cite it in its brief on the merits and most likely confining discussion of *IBM* to a cursory dismissal of its relevance in a reply brief. This strategy was begun in the court of appeals where the *IBM* case was not mentioned by the government until page 48 of a 50 page brief and then analyzed in the reply brief. The pattern continued in the petition for a writ of certiorari which also did not mention the *IBM* case. The only discussion of the case is in a summary dismissal of its relevance on pages 1-3 of the reply to respondent's brief in opposition to the petition for a writ of certiorari. In view of this total failure to deal meaningfully with the *IBM* case, which is of such obvious moment to the case at bar, we respectfully

submit that the Court would be totally justified in disregarding the entire brief filed by the petitioner.[2]

The undersigned *amici* have participated at all stages of this case before the United States Court of International Trade and the court of appeals and have fully supported the briefs, other papers, and oral arguments made by respondent. As we anticipate that the same arguments will be made in the final version of the brief which respondent will file in this Court, we will not burden the Court with a point by point repetition of those arguments, but will adopt them and incorporate them by reference herein. Rather, in compliance with Supreme Court Rule 37, we will attempt to assist the Court by amplifying certain key points and adding factual and legal perspectives to those already advanced by respondent and other *amici*. In this way, we hope that we will meaningfully assist the Court in analyzing the issues in this case and at the same time advance the cause of those parties on whose behalf we appear as *amici curiae*.

THE HMT VIOLATES ARTICLE I, SECTION 9, CLAUSE 5 OF THE CONSTITUTION WHICH PROVIDES THAT NO TAX OR DUTY SHALL BE LAID ON ARTICLES EXPORTED FROM ANY STATE

The HMT is explicitly a tax and duty on cargo since under 26 U.S.C. 4462(a)(1)(A) liability for the HMT arises from the act of "loading of commercial

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[2] We note that the brief filed by the State of Oregon as *amicus curiae* in support of petitioner similarly fails to cite or discuss the decision in the *IBM* case. For that reason, we will not address the irrelevant issues raised in that brief.

cargo on . . . a commercial vessel at a port," and as it applies to exports is a tax upon the exportation of that cargo in violation of Article I, Section 9, Clause 5 of the Constitution.

Inasmuch as the HMT is a federal tax levied on exported cargo, even if found to be non-discriminatory, the assertions of the government as to its constitutionality were expressly rejected by this Court's decision in *IBM*, in which a tax levied on insurance premiums that covered export shipments of goods was reviewed. The Court held as follows in *IBM*, 517 U.S. at 845:

> We resolve in this case whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit. We hold that it does not.

In *IBM*, the Court refused to overrule its early precedents and emphasized that meaningful textual differences that exist between clauses of the Constitution should not be overlooked and that the "common and usually expansive meaning" of the word "tax" should not be ignored. 517 U.S. at 857-858. The Court further dismissed the same arguments now being presented by the government in this case which rely on cases involving the Commerce and Import-Export Clauses.

The *IBM* decision adopts in essence the interpretation of the Export Clause found in precedents of this Court. In so doing, this Court reaffirmed the validity of those precedents. Significantly these same precedents along with the *IBM* decision were relied upon by the court of appeals in this case. The

government's attempts to continue to rely on utterly distinguishable precedents simply ignores the *IBM* case. For the reasons suggested at the outset of this brief, the entire argument in the petitioner's brief should be summarily rejected.

The court of appeals properly followed the decision in the *IBM* case and the principles of the cases cited therein. What petitioner has done is to completely ignore the *IBM* decision in the hope that the Court will somehow merge the principles in cases interpreting the Commerce Clause and the Import-Export clause into the Export Clause despite the refusal of the Court to do so in the *IBM* case. What the *IBM* case stands for is the proposition that the Export Clause prohibits a tax on exports and if the HMT is a tax on exports, which by its very terms it is, the considerations in the cases cited by petitioner are never reached. The total bankruptcy of the government's case is exposed by its complete failure to meaningfully deal with the *IBM* decision.

Because the HMT by its terms is a tax and duty specifically applied to the *ad valorem* content of exports, it violates the express terms of Article I, Section 9, Clause 5 of the United States Constitution, and for this reason is unconstitutional and void. *Amici* respectfully submit that the United States Court of International Trade was correct in determining that (Pet. App. 66a):

> As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S.Ct. at 485-86, a tax imposed on the further step of loading such cargo onto the

> vessel also falls within the prohibition of the Clause.

The court of appeals affirmed the reliance of the United States Court of International Trade on *A.G. Spalding* and rejected the government's argument that the HMT was somehow not a tax on exports because it is a user fee. (Pet. App. 23a-24a.)

It is uncontested by the government that loading of cargo on a vessel for export encompasses the ultimate act of exportation. Courts have long held that a tax cannot be levied on export cargo, *Fairbank v. United States*, 181 U.S. 283, 290 (1901), nor can it be levied on the act of exportation. *United States v. Hvoslef*, 237 U.S. 1 (1915). The predecessor of the Court of Appeals for the Federal Circuit, the Court of Customs and Patent Appeals, held in a case involving the dutiability of charges incurred in connection with the loading of cargo on a vessel that those charges were non-dutiable since they "accrue necessarily and directly as a result of exportation." *Kurt Orban Co., Inc. v. United States*, 577 F.2d 1125, 1130 (CCPA 1978). The movement of cargo *"to shipboard is consistent only with exportation."* *Ibid.* (emphasis in original). Therefore, by levying the tax in direct proportion to the cargo's value, Congress could not have imposed a tax any closer to exportation or more directly on exports.

Indeed, it is inescapable that under the *IBM* decision, the HMT violates the Export Clause of the Constitution as a direct tax on exports. We note that petitioner cannot even find support in the dissenting opinion in *IBM* for its position that the HMT does not violate the Export Clause. The dissenting opinion recognized the constitutional prohibition in the Export Clause of any direct tax on

exports. It merely took issue with the majority because it did not believe the tax on insurance premiums was the equivalent of "a proxy for taxing the goods . . . ." 517 U.S. at 864. However, there was no dispute with the majority regarding the fact that the Export Clause prohibits "what its text says: any federal tax laid on Articles exported, U.S. Const. Art. I § 9, cl. 5." *Id.* at 868.

The government has failed to meaningfully address the issue that the HMT by its very terms is a tax on exports. There was no argument by the government that the indirect tax in the *IBM* case was not a tax on exports, and it certainly cannot argue that the *ad valorem* tax on exports in this case is not a direct tax on exports. The majority in the *IBM* case after concluding that the Export Clause "does not permit assessment of nondiscriminatory taxes on goods in export transit," noted at 517 U.S. at 863:

> Reexamination of the question of whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day.

That day has yet to come. A more direct tax on exports and the act of exportation than the HMT cannot be envisaged.

In *IBM* the court was careful to distinguish permissible federal taxation of pre-export goods and services from a prohibited "tax or duty, discriminatory or not, that falls on exports during the course of exportation." 517 U.S. at 848. The HMT is not levied on pre-export goods or services, it is a classic example of a direct tax on exports in the

act of exportation. Under the Customs Regulations, 19 C.F.R. 24.24 (1995), the exporter becomes "liable" when the cargo is loaded on the vessel "for export." In short, the tax accrues when the cargo becomes an export.

The government contends that the HMT is not a tax upon exports in violation of the Export Clause but merely a user fee. As the United States Court of International Trade noted in its opinion in this case (Pet. App. 53a):

> Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, ___U.S.____, ____, 115 S.Ct. 1624, 1627, 131 L. Ed. 2d 626 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (citations omitted).

This is not the first time that Congress has passed an unconstitutional tax on exports and, it would thus appear, it will not be the last time. In *IBM*, the Court unequivocally stated:

> The text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports . . . . [S]hifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause.

IBM, 517 U.S. at 852.

Specifically addressing taxation and duties on exports, this position was strongly reaffirmed in *IBM* where the Court cited to *Fairbank v. United States*, 181 U.S. at 290:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the Courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress.

IBM, 517 U.S. at 848.

Petitioner has taken great pains to raise issues which are not relevant to the constitutional issue before the Court. The issue in this case is not whether the harbors of this country need dredging. They do. The issue is not who should pay for the dredging of the harbors or how it should be funded. That is for Congress to decide. The issue is whether a constitutionally permissible tax has been enacted. It has not. The *IBM* case stands squarely for the proposition that a direct tax on exports is not permitted under the Export Clause. There are patently simple alternatives to the HMT which could easily pass constitutional muster and not violate the Export

Clause. It is obviously for Congress, and not the courts, to choose among these many viable alternatives, a number of which involve political considerations.

If the tax was truly a user fee which could pass constitutional muster, at the very minimum, it would have to be imposed on the vessels using the port and not on the value of the cargo on those vessels. The government is claiming that the fees collected are to be used for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational. If these fees were used as purported by the government to help defray the cost for the construction, maintenance and operation of channels and harbors, at the very least, the tax would have to bear some reasonable relationship to the actual use of the ports and harbors by all vessels and vessel operators. A valid user fee would apply to all vessels, whether cargo or non-cargo vessels, and would apply whether they were full or empty.

Instead, the tax is imposed at the very point where the act of exportation occurs, on the value of the cargo and with no reasonable relationship to the use of the ports by the vessels. For example, the tax on a handful of diamonds loaded on a vessel would undoubtedly exceed the tax on a container load of salt, demonstrating that the HMT is not a user fee because the amount of the tax collected has nothing to do with the use of the harbor by a vessel and is not even remotely connected or commensurate with the use of the harbors.

The conclusion that the HMT is unconstitutional under numerous Supreme Court cases, some of which were cited herein, is further supported by reference to the legislative history of the Water Resources Development ("Act"). The Committee

Hearings indicate that Members of Congress and their committee staffs recognized the unconstitutionality of the provision. The legislative history of the Act will undoubtedly be set forth in respondent's brief and there is little purpose in burdening the Court by repeating it.

However, there can be little doubt that Congress was fully aware that it was enacting an unconstitutional tax insofar as the HMT applied to exports. Though Congress characterized the HMT as a user fee it recognized that it was prudent to make the export tax provision separable from the rest of the bill so as to avoid having a successful constitutional challenge to the export tax undermine the entire bill. To say the least, the actions of Congress in denominating the HMT a tax on port use under 26 U.S.C. 4461(a) were disingenuous. Clearly Congress has imposed "a duty under the pretext of fixing a fee," *Pace v. Burgess*, 92 U.S. 372, 376 (1876), leaving to the Courts the unpleasant task of declaring the law unconstitutional. In the words of the Chairman of the House Committee on Merchant Marine and Fisheries, a "tax by any other name remains a tax." H.R. Rep. No. 251 (IV) 99th Cong., 1st Sess. 23, 41 (1985). As noted by the Chairman, the "research performed by and at the Committee's request, only strengthens my convictions in this regard." *Ibid.*

Since the tax on the value of the cargo has nothing to do with the use of the harbors by the vessel and is not even remotely connected with imposing the tax in an amount commensurate with that use, in the case at bar, "the text of the constitutional provision provides a better decisional guide than that offered by the Government." *IBM*, 517 U.S. at 860. Hence, the "better reading, that adopted by our earlier cases, is

that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." *Ibid.*

In striking down the non-direct fee on exports in *IBM*, 517 U.S. at 855 n.3, the Court emphasized that

> In *Fairbank*, *Hvoslef*, and *Thames & Mersey*, we struck down taxes that were *not assessed directly on goods in export transit*, but which the Court found to be so closely related as to be effectively a tax on the goods themselves (emphasis added).

The HMT is far more than the equivalent of a tax on exports; by its clear and unmistakable terms, it is a direct tax and duty on the export cargo. If indirect taxes in *Fairbank, Hvoslef, Thames & Mersey and IBM* were unconstitutional, a direct tax such as the HMT certainly is.

In view of the construction given by the Court to the Export Clause, which led to invalidation of non-direct taxes on exported merchandise on constitutional grounds in a long line of cases culminating with the *IBM* case, this Court should have little difficulty in determining the unconstitutionality of the direct taxation of exports by the HMT. The decision in *IBM* is *stare decisis* of the real issues, if any, which remain in this case. The principle of *stare decisis* should be followed in this case for the same reasons that it was followed in *IBM*, 517 U.S. at 856.

Therefore, we respectfully submit that the Court should affirm the findings of the court of appeals that the HMT, as it applies to exports, constitutes a tax prohibited by the Export Clause.

CONCLUSION

We respectfully submit that the court of appeals was correct in holding that the HMT, as it applies to exports, is an impermissible tax and duty on exports in violation of Article I, Section 9, Clause 5 of the Constitution. The correctness of that decision is underscored by the holding of this Court in *IBM*. For all of these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 1998